Law Vol. 4.

A

DISCOURSE

ON

FEES of OFFICE

IN

COURTS of JUSTICE.

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BIBLIOTECA DE PALACIO

THE

PREFACE.

THERE is nothing more to be wiſh'd for, than that the *Fees* for the certain Buſineſs and known Duty of *Officers*, in Courts of Juſtice, were aſcertained and ſtated, as far as the Nature of things will permit.

It is ſomewhat ſurpriſing to conſider, that in the voluminous Treatiſes in the Law, on the various kinds of Rights, from thoſe of the Crown to the meaneſt Subject; the Rights to

Fees of *Office* in the Courts of Juſtice, and of *Suitors* and *Officers* with regard to thoſe *Fees*, ſhould be in a manner omitted, or no otherwiſe mentioned than in the general, and incidentally; namely, *That* Offices *are inſtituted not for their own ſakes, but for the ſake of the* Suitors, without deſcending particularly into the Right, or Merits of either ſide.

From this Cauſe (amongſt others) Errors and Diverſities have ariſen both in Opinion and Practice: I have therefore often wiſh'd to have ſeen theſe Matters treated of by ſome able Hand; but as no one hath hitherto (I believe) undertaken the Task, I have attempted it. And if this Attempt (how imperfect ſoever it may be) ſhall prove uſeful to the Publick in general, or to ſuch of the Profeſſion in particular, as are diſpoſed to employ their Thoughts on this Subject, my End will be fully anſwered.

My Design is to consider the Nature of *Fees* of *Office* in civil Causes; and the Rights of *Suitors*, to prevent unnecessary *Fees*, as well as the *Right* of *Officers* to their *Fees*.

If the Reader expects to meet with any thing in support of unjust or unreasonable *Fees*, or in the least disrespectful of *Officers*, or tending to lessen their just and reasonable *Fees*; I hope he will find himself disappointed. I shall endeavour to treat my Subject with strict Impartiality, and to avoid all Reflections.

It is a mistaken Notion to suppose, that the Questions about lawful and reasonable *Fees*, wholly depend on Mens different Sentiments of what is lawful, and reasonable in these Matters, which honest and well-meaning Men may see in different Lights; but this Supposition has, I am persuaded,

ſuaded, averted the Thoughts of many from this Subject.

If I can make it appear, that the Right to *Fees* of *Office* in Courts of Juſtice muſt depend on the Nature of Things, or (in other words) upon the Relation between *Suitors* and *Officers*; and the End for which *Officers* muſt be ſuppoſed to have been inſtituted; many Difficulties, and Miſapprehenſions will (I imagine) be thereby removed.

If the Law at preſent did not vary from what it was in ancient Times, as to *Fees* which have been eſtabliſhed by Uſage for many Years paſt, (and are in themſelves lawful and reaſonable, tho' exceeding ancient Tables or Records) terrible and cruel might be the Conſequences; but I hope it will appear, there needs no frightful Apprehenſions of ſuch Conſequences.

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Whether the Law, as to the Rights of *Officers* to their *Offices*, is in any, and what reſpect changed from what it anciently was, is a Point I ſhall not concern myſelf with; much leſs ſhall I meddle with the Rights of Authority and Juriſdiction in any of theſe Matters. A ſufficient Knowledge of what I propoſe to treat of, may, as I apprehend, be attained, without entring on any of theſe Points.

All I can ſay for the Treatiſe is, that it is the Fruit of ſome Inquiry and Obſervation; and ſuch as it is, I offer it to the Conſideration of the Publick, in hopes it may have this good effect, at leaſt to produce one more perfect and correct. I am ſenſible, there may be many Defects in the Performance, but do aſſure the Reader, I do not wiſh, that any Notion, Poſition, or Argument he will meet with, may be received further than

they are founded in Truth and Equity. Any Errors I may have committed, either in Law or otherwiſe, are purely involuntary, and therefore hope the candid Reader will make all proper Allowances; and if he will generouſly vouchſafe to correct thoſe Errors, I ſhall gratefully acknowledge the favour.

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THE INTRODUCTION.

IN conſidering *Fees* of *Office*, a difference is to be made between the *Right* to *Fees*, and the *Quantum* of *Fees*; and if theſe are carefully diſtinguiſh'd, it will, I conceive, remove many Difficulties about them.

As for the *Right* to *Fees*, or the Right of *preventing* them, I have no ſcruple in laying down this as a Maxim, That the Reaſon of Things is the Foundation of all Right; and I hope it will throughout appear, that the Right in Law, and Reaſon, in either of theſe Caſes, is, and muſt be, the ſame at all times.

About the *Quantum*, and the Particulars or *Items* of *Fees*, which in their own nature are variable in different Times and Circumſtances, and as the Methods and Manner of Buſineſs vary and alter; wiſe and honeſt Men may be allow'd to differ, if they are not fixed by ſome Rules or Laws. What thoſe Rules or Laws are, will be ſhown hereafter,

when I come to consider particularly *Fees*, *lawful* and *reasonable*, and the difference between them.

The Rights of *Suitors* and *Officers* are mutual: and as in all mutual Rights, one must precede the other, the main Question, and the Hinge upon which almost all other Difficulties turn, is, which of these two Rights is to be preferr'd as the antecedent.—— This is a Question of very great importance in itself, and in settling almost all other Questions; but I apprehend of no great difficulty.

I propose to consider the *legal* Preference; and the Propositions I would lay down, and hope to make good, are,

Prop. 1. That the Right of the Subject, (before a Suit commenced) and of the *Suitors* (afterwards) *to prevent Fees* of *Office*, is an antecedent Right to that of *Officers* to their *Fees*.

Prop. 2. That the Performance of every Act of *Office* for which a *Fee* arises from the *Suitors* (except in criminal Cases, or for Crimes punishable by Civil Courts) depends on the Right and Pleasure of the *Suitors*, in requiring or directing that Performance.

Prop. 3. That *Officers*, *upon* performing the Duty or Business of their *Offices*, at the Request, or by the Direction of the *Suitors*, have at all times a natural Right to a Recompence or Reward for their Duty.

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In the firſt of the enſuing Chapters, I ſhall endeavour to prove, and make good theſe Propoſitions in Law, from the Relation between *Suitors* and *Officers*, from the Reaſon and Nature of Things, and from Facts as they are *legal* Arguments.

In the ſecond Chapter, I ſhall conſider ſome Matters particularly relating to *Officers* and *Suitors*.

And in the third Chapter I ſhall conſider and explain the Nature of *Fees* of *Office*, and the *Law* both ancient and modern with regard to *legal* and reaſonable *Fees*; and ſhall treat of ſuch *Fees* as are wholly and abſolutely unreaſonable.

But before I enter on either of theſe things, it will be neceſſary to explain ſome Terms I ſhall have frequent occaſion to uſe, and to caution againſt any miſtake in the uſe of others.

The Terms of *Suitors* and *Officers* I ſhall conſider in a very large extent, ſo as by *Suitors* to take in not only Plaintiffs and Defendants, but Relators, Prochein-Amys, Guardians, Committees, Legatees, Creditors, Buyers and Sellers of Eſtates, and all others who have any concern in Suits, or Matters depending in Courts of Juſtice, and their Council, Attornies, Sollicitors, and Agents. And by *Officers*, to include generally all Ranks and Degrees of ſuch as are Miniſterial, and their Deputies, Miniſters, Clerks, and Under-Clerks,

 without

without diſtinction: and as I uſe theſe Terms as Terms of Art, I hope therein to give no offence.

The Term of *the Subject* will be frequently mentioned by way of diſtinction from *Suitors*, to denote every one of his Majeſty's Subjects who have a Right to be, but are not become, *Suitors*.

By *Fees*, wherever it is uſed, is *only* and *always* meant ſuch *Fees* of *Office* in Courts of Juſtice as the *Suitors* are concern'd in, ſo as to exclude all Sallaries or Rewards annex'd to *Offices*, of what nature ſoever, in which *Suitors* are unconcerned.

The Term of *the Requeſt* or *Direction* of the *Suitors* will often occur, whereby is meant not only their *actual* Requeſt, or Direction, but their *virtual* or *implied* Requeſt, or Direction on the *Motion*, *Application*, or *Proſecution of their Council*, *Attornies*, *Sollicitors*, *or Agents on their behalf*.

The Term of *preventing Fees*, will frequently be uſed, as a Term of Art, and for brevity: but as it may bear a popular or harſh Conſtruction, contrary to my real Intention either way, I would be underſtood thereby always to mean (where it is not ſo expreſs'd) *ſuch a Prevention of the Performance of Acts of Office*, (whereon *Fees* ariſe) *as Suitors can juſtly prevent, either by not requeſting ſuch Performance, or by rendring the ſame unneceſſary*.

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The Exception before made of criminal Caſes, or Crimes puniſhable in Civil Courts, is to be carried throughout the whole of what follows. The Rights of *Officers* to their *Fees* in theſe caſes being built on another Foundation, and on Reaſons differing from ſuch as ariſe between *Suitors* and *Officers*, and are therefore ſuch, as I ſhall in no wiſe meddle with.

I will cloſe this Introduction by obſerving, that whoever turns his Thoughts to this Subject, will immediately perceive,

1*ſt*, That the Right to become a *Suitor*, and the Right to the Duty of *Officers* in a Court of Juſtice, is a Benefit and Privilege.

2*dly*, That the Buſineſs and Duty of *Officers* is an Employment of Truſt, Skill, and Labour, more or leſs, and advantageous to the *Suitors*.

3*dly*, That *Suitors* know their own Intereſt and Advantage better than *Officers*.

4*thly*, That *Officers* know their own Duty better than *Suitors*.

CHAP.

CHAP. I.

The general Propositions proved from the Relation between Suitors *and* Officers; *and from Fact.*

Prop. I. THAT the Right of the Subject, (before a Suit commenced) and of the *Suitor* (afterwards) to prevent *Fees* of *Office*, is an antecedent Right to that of *Officers* to their *Fees.*

Suitors and *Officers* are relative to each other; and as they have a mutual Benefit, so they have a mutual Dependance on each other, as to the Properties and Estates of the one, and the Recompence and Reward of the other.

The Relation between *Suitors* and *Officers* is a *legal* Relation, created and formed by the Law, which (if I mistake not) knows of no other Relations, than those of its own Creation.

If Father and Son are the Plaintiff and Defendant, or *Suitor* and *Officer*, the Law knows

knows not the *natural*, but the *legal* Relation, as Plaintiff or Defendant, *Suitor* or *Officer*.

Authors who have wrote on the Subject of Relations, (at leaſt the few I have read and like on the Subject) lay the Foundation of all Relations whatever, either (1.) on Compact in Nature or Reaſon, or on actual Agreement: Or, (2.) on ſome Benefit hoped for, or received. The Difference between theſe two ſeems to be only in Expreſſion; or (if there be any farther difference) the former ſeems to refer to the Duty, and the latter to the Advantages of the Relation. For all agree, the Duties and Benefits are reciprocal, equally obliging each Party; and likewiſe agree, that the Relation either way is antecedent to all Laws; and that there is no ſuch thing in nature as for one Man to require a Service, or Duty from another, without being obliged to do him ſome Good in return.

The Original and Inſtitution of *Offices*, and *Officers* in Courts of Juſtice, in the nature of the thing, muſt be ſuppoſed to have been for the Good and Benefit of ſuch Subjects as ſhould become *Suitors* in thoſe Courts. For taking away this Suppoſition, there never would or could have been ſuch an Inſtitution.

From hence it is ſelf-evident, that *Suitors* have the *antecedent* Right in *nature* to the Duty of *Officers*; and that they have *legally* this *antecedent* Right to ſuch *Duty*, will be ſhewn preſently. In

In order to ſee which of the two Rights is the primary and antecedent, the Caſe on both ſides muſt be fairly and impartially conſidered.

Let it on the one hand be conſidered, that altho' a Suit at Law may, in ſome advantageous Circumſtances on the ſide of the *Suitor*, not be reckoned a Calamity; yet it is always, and in all Circumſtances, and to all Perſons, more or leſs *undeſirable*. And by the Laws of Nature and Reaſon, every one has a Right to prevent this, as well as every other misfortune.

On the other hand, let it likewiſe be conſidered, that for the Relief and Service, Defence and Protection of the *Suitors*, not only great Truſt and Confidence, but great Labour and Attendance, Knowledge and Ability are required in many *Officers*; and by the ſame Law of Reaſon, Perſons ſo qualified ſhould have a ſuitable Recompence for their Duty and Service; which Recompence our Laws have made to be ſtated and known *Fees*.

If theſe Circumſtances and Rights are fairly put together, it muſt be obvious to every Capacity, that the Subject's Right of preventing ſuch Acts of *Office*, (whereon *Fees* ariſe) is the primary and antecedent Right; and that the Right of *Officers* to their *Fees* is ſubſequent and dependent on the Right of the Subject; and that in reaſon the Right of the

Subject

Subject is to be perferred, it being by no means unequal, to prefer an antecedent to a subsequent Right, tho' it would be so *vice versâ*.

As the Right of the Subject to *prevent Fees*; and of *Officers* to their *Fees*; and the Dependance of the latter on the former is agreeable to Reason, and the Course and Order of Nature: so if Law-Books of the best Authority may be credited, they are therefore good in Law, because founded on those *Maxims* or fundamental Principles of Law, which are allowed to be so sure and fix'd, that they are not to be disputed, but to be taken for granted in all applicable Cases. As such *Maxims* or Principles then can be produced, they need only be mentioned; namely,

THAT THE LAW OF REASON IS ABOVE ALL POSITIVE LAWS. *Davis's Reports, fol.* 32. The Case of *Tanistry*.

THAT NOTHING THAT IS CONTRARY TO REASON IS CONSONANT TO LAW. 1 *Inst.* 56. *b.* 97. *b.*

THAT THE RIGHTS OF NATURE ARE IMMUTABLE. 7 *Rep.* 12, 13.

THAT THE LAW RESPECTS THE ORDER AND COURSE OF NATURE. 1 *Inst.* 11. *a.* 92. *a.* 197. *b.*

Prop. II. That the Performance of every Act of *Office* for which *Fees* arise from the

Suitors, (except in criminal Cases, or for Crimes punishable in Civil Courts) depends on the Right and Pleasure of the *Suitors*, in requesting or directing that Performance.

This directly follows from the Truth and Reasoning of the former Proposition, and is built on the Relation and Dependance between *Suitors* and *Officers* : and in further support of this Proposition, I need only subjoin these three *Postulata*.

1*st*, That Acts of *Office* are nothing else but the Performance by *Officers*, of such regular and requisite Acts, on behalf of the *Suitors*, as are proper, and allowed in commencing, prosecuting, and defending their Actions or Suits.

2*dly*, That the Right of commencing, prosecuting, or defending Actions or Suits, is wholly in the Subject or *Suitor*, which they may exercise or not, at pleasure.

Actions and Suits in modern Language, are only different Terms of Art for Contests between *Suitors* in different Courts. And my Lord *Coke*, from *Bracton*, a Writer of great Antiquity and Eminence in the Law, thus defines an Action at Law, ACTIO *nihil aliud est quam* JUS PROSEQUENDI *in Judicium quod alicui debetur*. 1 Inst. 285.

3*dly*, That wherever an Act, or the Performance of an Act, to which a Reward or Benefit is annext, or of right belongs, depends on

on the Right or Pleaſure of another; that Right muſt be firſt exerciſed, and that Pleaſure ſome way ſignified, to authorize the Performance of ſuch Act, to which ſuch Reward or Benefit is annext, or of right belongs.

I would here barely remark on both the preceding Propoſitions, that very many would be the Inconveniencies and Abſurdities which muſt follow, if they were not true. Many of theſe cannot but preſent themſelves to every Reader; but the moſt material (which poſſibly may not readily occur to every Reader) is, that the contrary Poſitions do at once abſolutely and totally deſtroy the ſingle and whole Dependance of *Officers* on *Suitors*, as will be evident to any one, who will be at the ſmall pains of inverting the Propoſitions. And Arguments *ab Inconvenienti*, and *ex abſurdo*, are univerſally allow'd to be *legal* Arguments.

Prop. III. That *Officers*, upon performing the Duty or Buſineſs of their *Office*, at the Requeſt, or by the Direction of the *Suitors*, have at all times a natural Right to a Recompence, or Reward for their Duty.

This is ſelf-evident; for nothing is more certain, than that if *Suitors* have a Right to the Duty of *Officers*, they will have a Right to their Recompence, or *Fees* from the *Suitors*; becauſe no one can require any thing as a

Duty from another, to whom he does not owe ſomething by way of Duty.

And the Laws having limited this Recompence to *Fees*, which are in their own Nature various, in different Times and Circumſtances; and theſe *Fees* being (as will hereafter appear) partly *legal*, and partly reaſonable, *Officers* have therefore, on performing the Duty of their *Offices*, a *legal* Right to ſuch *Fees* as are *legal*, and an equitable Right to ſuch as are reaſonable.

In the Method I have ſet out, I take this to be the proper place to prove, that the antecedent Right of *Suitors* to the Duty of *Officers* is a *legal* Right. I apprehend I have ſhown, they have the primary Right from the Nature and Inſtitution of *Officers*; and if the foregoing Maxim or Principle be Law, *That the Rights of Nature are immutable, and that the Law reſpects the Order and Courſe of Nature*; it will then be evident, that ſuch Antecedence is a *legal* Right. And here I would obſerve, that " nothing is plainer from the whole Frame and Tenor of our Laws, than that *Suitors*, in common with every Subject of the Kingdom, have a Birthright and Inheritance in their Rights, and in the Laws of the Land." And this will clearly appear to any one, who will conſider the Arguments and Conceſſions of the learned Managers, and Councel, in Dr. *Sacheverell*'s Trial.

I proceed next to ſhew from Fact, that every *Fee* of *Office* (except in criminal Caſes, or for Crimes puniſhable by Civil Courts) depends on the Exerciſe of the *Suitors* Right; and that no ſuch *Fee* can ariſe, but upon the *Officer*'s performing the Duty, or Buſineſs of his *Office*, by the Direction or Requeſt of the *Suitors*, or on their behalf. *Ex facto Jus oritur.* 1 Inſt. 226. b.

The Truth of this Fact I ſhall endeavour to prove by Inſtances or Examples of two kinds; the firſt of which, ſhall be of ſuch *Fees* as ariſe on the Commencement of a Suit, both in the Courts of Law and Equity; and the other, of ſuch *Fees* as ariſe in the Proſecution or Defence of a Suit in Equity, after the Commencement.

Firſt, Of the *Fees* which ariſe on the Commencement of a Suit, in a Court of Law, or Equity.

It is the Right of the Subject to commence a Suit at Law, or in Equity; and if he would exerciſe this Right in a Court of Law, he muſt take out, or beſpeak a Writ from the proper *Officer*: If in a Court of Equity, he muſt deliver a Bill to be filed, with a proper *Officer*; and upon the *Officer*'s performing the Duty or Buſineſs of his *Office*, the Right to his *Fee* ariſes; *e.g.* If in a Court of Law, the *Fee* for the Writ; and if in a Court of Equity, the *Fee* for filing the Bill.

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Theſe are the firſt *Fees* of *Office* that can poſſibly ariſe; and all other, and future *Fees* in other *Offices*, have the like Dependance and Commencement.

And the *Fees*, in both Caſes, appear manifeſtly to depend upon the Exerciſe of the *Suitor*'s Right; namely, upon the *Officer*'s Performance of the Duty of his *Office*, on the Requeſt, or by Direction of the *Suitor*. The *Officer* at Law cannot exerciſe his *Office* by granting a Writ, unleſs the ſame is required by the *Suitor*: Nor can the *Officer* in Equity exerciſe his *Office* by filing a Bill, unleſs the ſame is delivered to him by the *Suitor*; or in other words, neither can exerciſe their Right, unleſs required by the *Suitor*.

Secondly, Of ſuch *Fees* as ariſe in the Proſecution, or Defence of a *Suit* in Equity, after the Commencement. Theſe are of two ſorts:

1*ſt*, Such as ariſe before, and at the Hearing.

2*dly*, Such as ariſe on Matters directed to be performed by *Officers* after the Hearing.

1*ſt*, Of ſuch *Fees* as ariſe after the Commencement of a Suit in Equity, before, and at the Hearing.

If both ſides are in earneſt, and would ſave all unneceſſary Expences, theſe Acts of *Office* following are neceſſary and unavoidable; *viz.* (1.) An Appearance. (2.) Copies of

of the Pleadings. (3.) Setting down the Cauſe. (4.) The proper *Officers* attending the Hearing. (5.) The Order on Hearing.

Theſe are Acts of *Office* abſolutely neceſſary in all Cauſes heard, and where a Decree is made, and deſigned to be purſued; and theſe Acts depend on the *Suitors* requiring, or directing the ſame in every inſtance. They may, if they can ſo agree, not only ſtop the Hearing, but prevent the firſt, ſecond, and ſo on, to the laſt of theſe Acts, and conſequently the *Fees* ariſing on each of them, without any Injury to the Rights of any *Officer*.

I have here deſignedly omitted every unneceſſary Act of *Office*, which *Suitors*, who are under no Diſabilities, and are agreed in Facts, and would hear their Cauſe, may prevent; as Subpœnas, Attachments, Affidavits, examining Witneſſes, and many others; in which Caſes, the particular *Officers* concerned in theſe Matters, can no more complain of any Injury in their Rights, than if there had been no Suit at all commenced.

2*dly*, Of ſuch *Fees* as ariſe on Matters directed to be performed by *Officers* after Hearing.

It would be as endleſs, as unneceſſary, to enumerate all ſuch Matters, as on the Variety of Buſineſs may be directed to be performed by particular *Officers*, by Decrees, or Orders of Courts of Equity. I ſhall inſtance only in a few that ariſe on Orders on Hearing.

1.

1. For computing Intereſt, and taxing Coſts.

2. For Sales of Eſtates.

3. For taking Accounts; and in order thereto, for the Parties to produce Books and Accounts, and to be examined on Interrogatories before the *Officer*.

How abſolutely and expreſſly ſoever theſe, or any other Matters may ſeem to be directed to be performed by *Officers*, they are all in favour of the *Suitors*; and as much depend on their Right in proſecuting, or requiring the Performance of them, as any of the former.

No one will ſay, that any *Officer*, unleſs required by the *Suitors*, can do any one of theſe Acts of *Office*, which he is directed to do, *per ſe*, or *virtute Officii*, merely.

If the *Suitors* are of Age, and under no Impediment by Lunacy, Infancy, *&c.* they may wave, compound, or releaſe all, or any of theſe Directions, as they can agree among themſelves; or whether under any of theſe Impediments or not, they may forbear proſecuting any of theſe Directions: And either of theſe Ways prevents the Performance of theſe Acts, and of conſequence the *Fees* ariſing from ſuch Performance, without any Injury or Injuſtice in the leaſt.

I might here add, as I could eaſily ſhow, That the firſt Acts in each of theſe Inſtances are to be performed by the *Suitors* themſelves; but

but as the other Facts are ſo well known, and (will be, I preſume) unconteſted, and, as I apprehend, they are ſufficient to make good the general Propoſitions; I would here cloſe this Chapter, were there not an Objection or Queſtion, which has, or may be made, in Matters directed by Orders of Court, where Infants, Lunaticks, *&c.* are concerned; namely, whether in *ſuch* Cauſes, if the *Suitors* would proſecute ſome of theſe Directions, they can wave others, and what?

The Queſtion is in itſelf of conſequence, and not wholly clear of difficulty.

Before I enter into it, I would obſerve in general, That altho' in particular Caſes and Circumſtances, ſome Difficulties will unavoidably ariſe; yet by all the fair and allowed Rules of Interpretation, difficult Caſes are to be explained by plain ones, and not plain ones made doubtful by ſuch as are difficult.

Now it will not be controverted, but that in theſe, as well as other Cauſes, the *Suitors* can prevent the *Officer*'s performing the whole of every Direction, either by not drawing the Decree or Order, or not proſecuting the ſame when drawn.

However, no one that is impartial, and acquainted with the nature of theſe things, will affirm, on the one hand, That if the *Suitors*, in Cauſes of *this ſort*, would proſecute *ſome*, that therefore they muſt proſecute *all* the reſt of the Directions: Or, on the

other hand, That in *these Causes* the *Officer* is to do such Matters *only* as the *Suitors* require or prosecute, and *no other*; for neither of these Propositions is unexceptionably true.

The truth is, it is not possible to lay down general Rules, what Directions, in Causes of this sort may, or may not, be dispensed with in all Cases.

Some of such Directions are, in their own Nature, conditional. All Directions for Sale of Estates, and for taking Accounts of Assets, are so, being always for some express end, whether Infancy, *&c.* be in the case, or not.

If an Infant's Estate is decreed to be sold for Payment of a Debt, and the Trustee, or any other on behalf of the Infant, will pay the Debt: Or if an Executor, in trust for an Infant, is directed to account for Assets, and will either pay the Debt, or admit Assets: In either of these Cases, the End being answered, the Directions for that End cease of course, when Infants are concerned, as well as when they are not.

Further, many Directions may be, and commonly are dispensed with, such as Examining on Interrogatories, and Producing of Books and Writings. These are usually and necessarily directed in all matters of Account, because it cannot be known before hand, what occasion there may be for the use of them: But it does by no means follow, that they

they are to be performed merely from the Directions. The Examining on Interrogatories is more frequent, than the Producing of Books and Papers: The latter is not often neceſſary, but in Cauſes of great Fraud and Confuſion, or of great Calamity, as where Truſtees for Minors decline acting, *&c.* Excepting theſe, and ſome particular Caſes of high Truſt and Value, the Producing of Books and Writings are ſeldom neceſſary or required, but by Men of Contention.

The beſt Anſwer I can give to the Objection upon the whole, is, that in all Cauſes *where Infants*, &c. are concerned, and the *Suitors* of one ſide or other would proſecute the Decree, or any of the Directions therein; then whatever is *required*, and *neceſſary*, and *fit*, ought to be done. And here much depends not only upon the Skill, Judgment, and Integrity of the *Officer*, and of thoſe concerned for the *Suitors*; but on the Temper and Diſpoſition of the *Suitors* themſelves, and the Nature and Circumſtances, Plainneſs and Intricacy of the Caſe and Facts. The Power of the *Officer*, and the Truſt repoſed in him is very conſiderable. I will prevent myſelf from entring into any Queſtion about the Extent of his Power, by admitting, that if the *Suitors* require the *Officer*'s Performance of one or more Matters, directed to be done by him; and the *Officer* thinks in his own Judgment, he cannot fairly and re-

gularly do what is ſo required, without doing ſomewhat more, or further; he does *right*, and his *Duty*, in refuſing to do *barely* what the *Suitor* requires, though he ſhould be miſtaken in his Judgment. But I will ſuppoſe, no *Officer* ever did, or will give, for the reaſon of his Refuſal, that he may by doing what is ſo required, prevent other *Fees* to himſelf, which is the *Suitor*'s Right to prevent, if it lawfully and regularly can be.

To draw to a cloſe of this Chapter; in which, I imagine, I have proved, That the Right of *Officers* to their *Fees* is wholly dependent on the *Suitors*, and on the Exerciſe of their Right; that the Preference of the one, and the Dependance of the other's Rights, is founded in the Nature of things, and on the firſt Principles of Reaſon, and Law, and is true in fact: And though Difficulties and Objections cannot but ariſe in particular Caſes, yet *fundamental Principles*, grounded in the Nature and Reaſon of Things, and *Facts*, are ſtubborn things, and will never yield, tho' they may in particular Caſes be obſcured.

If the general Propoſitions are proved and eſtabliſhed on ſuch Principles, they will be ſure and ſafe Rules of interpreting all difficult Caſes: For to uſe the Words of a very learned Author, *If a general and perpetual Rule can be made in any degree uncertain, by the Difficulty of applying it to any particular Caſe, there*

there can never be any certainty of the Truth of any Rule, or Propoſition, whatſoever.

CHAP. II.

Matters relating to Suitors, *and* Officers, *and their mutual Rights, and Privileges.*

WHAT has been hitherto ſaid in the former Chapter, as to the Rights of *Suitors* and *Officers*, extends only to *Fees*; in other reſpects, great is the Dependance of *Suitors* as to their Eſtates and Properties, not only on the Integrity and Ability, but on the Power, Time, and Diligence of *Officers*. And though I decline meddling with the Rights of *Officers* to their *Office*, and their Power in particular Caſes; I will, however, lay down one Maxim as to *Officers*, without any exception; namely,

That every *Officer* of a Court of Juſtice, *in the due execution* of his *Office*, is *ſuperior* to every other Perſon in the World.

From this unerring and ſilent Maxim, ſcarce ever to be mentioned, but always to be

be ſuppoſed by *Suitors* and *Officers*, no ill conſequence can poſſibly enſue; and if duly attended to, it will effectually prevent the *Officer*'s giving or receiving any unbecoming Treatment in the Execution of his *Office*.

On this Principle is founded all that Truſt and Confidence neceſſarily repoſed in *Officers*, (in aid of Courts of Juſtice) for the Service and Eaſe of the *Suitors*. And it is on this Suppoſition, that *Officers* are preſumed to do what is juſt and right, if the contrary does not appear.

I have already, in the precedent Chapter, took notice in the general, of the Right of *Officers* to their *Fees*, as a Recompence for their Service and Trouble, ſuitable to their Service and Truſt; I will here add, that *Officers* duly qualified for, and who duly execute their *Offices*, ought not only in a wealthy Nation to be generouſly rewarded; but that it is for the Intereſt and Benefit of the *Suitors* it ſhould be ſo: And as I doubt not, but every Man of Senſe and Knowledge of the World, who would do as he would be done by, will admit this; ſo ſhall I not go about to prove it to thoſe, who think otherwiſe.

Officers for the recovering, or rather for the immediate ſecuring and payment of their juſt *Fees*, have great Privileges, and are armed with great and neceſſary Powers above moſt others: Such of them as have Eſtates for

their Lives in their *Offices* of Forty Shillings a year, have a Freehold in their Places, and as ſuch are allowed to vote in Elections; theſe and many more Privileges I readily allow: But, on the other hand, I hope it will be allowed, that the *Suitors*, as well as every other Subject, have a Birth-right and Inheritance in their Rights, and in the Laws of the Land; and that the *Suitors* have the primary and antecedent Right, it being indeed of no Service or Benefit in the leaſt to place any Right in a higher degree, than the Laws of Nature, and of the Land, have thought proper.

To do equal juſtice to my Subject before I cloſe this Chapter, I would obſerve, that as *Officers* have particular Privileges and Powers above others, ſo many of them are ſubject to ſome particular Hardſhips, in ſome Caſes, which no others of any Profeſſion or Buſineſs are liable to. I ſhall only obſerve, that (in *Offices*, where *Fees* are limited to particular Inſtances of Buſineſs) it ſometimes happens, that *Officers*, after they have gone thro' the greateſt, and very near the whole of their Trouble, by the *Suitors* agreeing the Matters in difference among themſelves, by Deaths, and other Accidents, are prevented from intirely finiſhing their Buſineſs, and of courſe from the moſt profitable part of their Pains and Labour.

CHAP.

CHAP. III.

An Inquiry into the Nature and Properties of legal Fees, *ancient and modern* ; *of* reaſonable Fees ; *and of* Fees *in themſelves* irrational.

ALTHO' *Fees* of *Office* in ſome inſtances reſemble other *Fees*, yet there is More or Leſs, or in ſome particular inſtances, a difference between them, and all other *Fees* whatever.

Legal Fees of *Office* may, I think, be thus defined ; *viz.* They are ſo much in *Quantum*, and in ſuch particular Inſtances, and no other, as an *Officer* in a Court of Juſtice is allowed, and has by Law, a Right to take in Recompence and Satisfaction for his Trouble, and Pains in the Execution of his *Office*.

As *Officers*, and their Buſineſs, are to be ſuppoſed well known ; ſo likewiſe are, or ought their *Fees* to be ſtated and well known, which are not to be diſputed by the *Suitor*, nor exceeded by the *Officer* ; but accepted as an adequate Recompence, and Satisfaction upon

upon the whole for his Trouble, and Skill in executing his *Office*.

In ſome *Offices* there are *Fees* allowed for every particular Inſtance of the Buſineſs there performed; in others, the *Fees* are limited to ſome Inſtances, and Branches of the Buſineſs only; and the *Officers* are reſtrained from any other *Fees*, and reaſonably; if the Recompence is adequate to the whole of the *Officer*'s Duty.

Every *legal Fee* muſt have two eſſential Properties.

1. It muſt have this reaſonable Foundation; *viz.* the actual Performance of ſome *Office*, Duty, or Service. Whether the *Fee* is adequate to the Duty performed, is not the queſtion here; there may be, and reaſonably, (as juſt before obſerved) ſome Duty, or Buſineſs of *Office*, to which there belongs no particular *legal Fee*. But, *è contra*, there can be no *legal Fee* without the Performance of ſome *Office*, Buſineſs, or Duty; becauſe it would then have no reaſonable Foundation, as between the *Officer* and *Suitor*; and without ſome reaſonable Foundation, there can be no *legal* Right to any thing, becauſe in that caſe it would be deſtitute of every *legal* Property.

The Reader will here recollect what I have laid down in the Introduction as to Salaries, and Rewards annext to *Offices*, wherein *Suitors* are unconcerned.

2. A *legal Fee* of *Office* muſt have a fixed, and determined *Quantum*. Theſe are Properties, or Incidents inſeparable from every *Fee* of *Office*, and in ſome inſtances, though not in all, the *Quantum* includes both *Manner*, and *Number*. If the Manner be an eſſential part of the *Quantum*, it muſt not in itſelf be unlawful. If the *Number* be eſſential, it muſt not in itſelf be unreaſonable.

Where the Nature of the Buſineſs doth not properly belong to the ſtated Duty of an *Office*; ſo as the *Quantum* thereof cannot poſſibly be aſcertained, the Recompence will fall under the Conſideration of Caſes extraordinary; which the Reader will meet with hereafter.

On the foregoing Definition and Properties of *legal Fees*, it is immaterial to the *Suitor*, whether the Profits are more or leſs; or whether in particular Inſtances, the *Fee* is too much or too little; or whether there is an Ebb, or Flow of Buſineſs. The Queſtion, ſo far as concerneth both *Suitor* and *Officer*, is, What is the *legal ſtated Fee?*

Having already taken notice, that the *Quantum* and *Inſtances* of *Fees* are in their own Nature variable in different Times, and as the Methods and Manner of Buſineſs vary and alter; and that if it were otherwiſe, the Conſequences might be terrible and cruel: I here propoſe to conſider, and prove theſe things, which I ſhall endeavour to do in the following Method, by enquiring briefly into the

Law,

Law, as to *Fees*, in very ancient Times, leſs ancient, and at preſent.

I. In very ancient Times, by the Common Law, which was affirmed by the *Stat.* of *Weſtminſter*, 1. No Sheriff, or other Miniſter of the King, whoſe *Office* did any way concern the Adminiſtration or Execution of Juſtice, or the common Good of the Subject, could take any Reward whatſoever, except what they received from the King. But a late ingenious Author, in his Treatiſe of *Pleas of the Crown* *, ſays, " It cannot be intended to be " the Meaning of that Statute to reſtrain the " Courts of Juſtice, in whoſe Integrity the " Law always repoſes the higheſt Confi- " dence, from allowing reaſonable *Fees* for " the Labour and Attendance of their *Of-* " *ficers*;" for that (as he obſerves) " there " can be no fear of any Abuſes, while they " are reſtrained to *known* and *ſtated Fees*, ſet- " tled by the Diſcretion of Courts, which " will not ſuffer them to be exceeded with- " out the higheſt Reſentment."

II. In leſs, but ſtill ancient Times, *legal Fees* (omitting ſuch as were ſettled by Act of Parliament) were ſuch as aroſe either by *Grant* or *Preſcription*, or *Uſage immemorial*, *conſtant*, and *uninterrupted*, of which there was no Evidence on Record to the contrary. Some ſuch *Fees* there are, which continue to this day; but theſe are not ſo nume-

 rous,

* *Haw.* P. C. 1 Vol. 171.

rous, as thoſe which come under the next Head of the Law at preſent; as to many of which, if they were to depend on ancient Grants, Preſcription, conſtant and uninterrupted Uſage, and to be unlawful where they exceed ancient Tables or Records, the Conſequences (as muſt manifeſtly appear to every one) would be terrible and cruel. But of this I obſerved before, there needs no frightful Apprehenſions, as I hope will evidently appear by conſidering,

III. That over and beſides ſuch *Fees* as are ſettled by Acts of Parliament, or ſtill continue on the foot of ancient Law, there are two other kinds of *Fees*, which, as the Law now ſtands, are *legal Fees*.

1. Such as have been eſtabliſhed by *Rules* and *Orders* of Courts of Juſtice, after Inquiry into their Reaſonableneſs. And,

2. Such as have, by *conſtant Uſage* for a long Tract of Time, been *paid* by *Suitors*, and *allowed* by proper *Officers* in Courts of Juſtice as *Fees* of *Office*, though by ancient Tables or Records, they might appear to be leſs, or otherwiſe in former Times. But about this ſort of *Fees* there is ſome difference in fixing, what is the Length of Time neceſſary to render them *legal Fees*: and againſt ſuch Uſage, there are two certain *Exceptions*.

Before I meddle with the Difference about the Length of Time, or the *Exceptions*; I muſt obſerve, that it is agreed on all hands, that

that *Usage* for a long Tract of Time is Law in Matters in themselves indifferent, or which are the proper Subject of positive Laws.

There has not for many Years been published in the Law, a Book of so great Authority, as a Treatise, intitled, *A Discourse of the judicial Authority belonging to the Office of the Master of the Rolls.* The learned Author, p. 194. says, " Nothing is better known, than " that the Course of Courts of Justice is the " Law of those Courts, and a part of the " Law of the Land. This is a Rule so well " established, that it holds even where such " Course might be shewn to have been otherwise in ancient Times; nay where, if it " was not for the Regard the Law has for " Precedents or Usage, such Course of Proceedings would be against the Rule of the " Common Law, or against an Act of Parliament;" for which the learned Author quotes several Authorities. And again, p. 199. " If Things established by Practice and Usage " should be controverted, how precarious, " and uncertain would be the Rights of the " People!"

If it were not Presumption to remark on a Treatise of so great Authority, I would observe, that what the learned Author hath before, and in other places laid down as Law, with respect to Usage, is by him applied to a Question of Jurisdiction, which is the proper Subject of, and has since, in that instance, been

been confirmed by a positive and particular Law, agreeable to that Usage which the Author has unquestionably proved to be the Law before. I mention this, because tho' Usage and Custom is Law in Matters which are the Subject of positive Laws; yet in Matters which have no Foundation in Reason, it will appear consistent with every thing advanced in that judicious Performance, that Usage and Custom are void, and of no force in Law.

But the Difference in fixing how long the Usage must be, for establishing *legal Fees*, is material; it being by some confined to sixty, by others to forty, and by some to thirty Years. And those who think thirty Years sufficient, have Arguments on their side which are not inconsiderable.

I could wish the Law was more certain as to fixing the Length of Time about these *Fees*. But here I must remark, that altho' it is not from Law and Usage self-evident what are lawful *Fees*, yet Law and Facts are the best, and in most *Offices*, the only Evidence that can be had of *Fees* being in themselves lawful and reasonable; and *Fees* that thus appear to be lawful and reasonable, should be submitted to by every honest, and good Subject.

And allowing for the different Sentiments about *legal Fees*, by Usage under sixty, or any other Term of Years; the Consequence I imagine will not be terrible, if *Fees*, that are

are upon the whole reaſonable, will anſwer the difference of Terms.

Suppoſing, for example, a Sett of Men of Knowledge and Experience, to the number of Twelve (as they make up the *legal* Number of a Jury) ſhould differ about a *Fee* by uſage for thirty Years, whether it is, or is not a *legal Fee*; four of them conceiving it *legal* by uſage of thirty Years, four and four conceiving otherwiſe, by its being under forty or ſixty Years. Notwithſtanding this Difference, they may however all agree in its being a reaſonable *Fee*; and in this they may likewiſe agree, though the *Fee* were under thirty Years: and ſuppoſing it were ſo to be found by a Jury, on a common Trial at Law, the Conſequence would be the ſame, as if all the twelve had thought it *legal*; for if the Verdict ſtands, it is made *legal*.

But having mentioned *reaſonable Fees*, it is neceſſary to go further into the Conſideration of ſuch *Fees* as are thus ſtiled. They are of two ſorts:

1. For new Buſineſs introduced into ancient *Offices*.

2. For Matters very accidental and extraordinary.

1. For new Buſineſs introduced into ancient *Offices*. The Difference between *reaſonable*, and ſuch *Fees* as are ſtiled *legal*, conſiſts mainly and principally in the Difference as to Time; *viz.* that the former are not ſo ancient

ancient as the latter. But if it is juſt and equitable where the ancient Methods of Buſineſs grow out of uſe, the *Fees* are obſolete; as undoubtedly it is. It is full as juſt and equitable, that for new Methods of Buſineſs, or for additional Buſineſs, or Duty laid on *Officers*, they ſhould have a reaſonable Recompence, or *Fee*.

And though it is true, that *reaſonable Fees* do depend on the Sentiments of Men, concerning what is, or is not reaſonable; yet it is as true, that this Dependance does not reſt on the particular Opinion of private Men, but either on the Judgment of known and experienced *Officers*; or in effect, as in all other Caſes where the Law determines the *Quantum meruit* between one Man and another; *viz.* on the Inquiry and Oaths of Men of Knowledge, and Experience; and their Verdict eſtabliſhed by Uſage, or proper Authority, and Juriſdiction.

2. For Matters very *accidental* and *extraordinary*, which cannot be foreſeen, or expreſſly provided for; as where an *Officer* is deſired to perform the Duty of his *Office* in an *extra-official manner*, as in the Caſe of Sickneſs, or Confinement of *Suitors*, or where Perſons of Rank and Diſtinction, inſtead of attending, are attended by *Officers*. So likewiſe, where *Officers* are required to attend other Courts, or at Aſſizes, *&c. extra* the Duty of their *Office*.

Officers

Officers are ſuppoſed attending their proper *Offices*; and *legal Fees*, which are *legal* Rights, are adapted to the ſtated and known Buſineſs of *Offices*, agreeable to a general Maxim in Law, *Ad ea quæ frequentius accidunt Jura adaptantur*. Dr. *Sach.* Trial.

However, in very extraordinary and accidental Caſes, *Officers* have an equitable Right to a ſuitable Recompence, which is extremely difficult, if not unneceſſary and impoſſible to reduce to certain and fix'd *Fees*, in proportion to the Rank of *Officers*, and the Attendance, Trouble, and Charge they are at.

In theſe Caſes there is ſeldom any difference with *Suitors*; but if any ſhould ariſe, it is to be ſettled either by Authority of Courts of Juſtice, or as the Law determines in other Caſes; or *Quantum meruit*, between one Man and another.

The *Exceptions* againſt Uſage, how long ſoever as to *Fees*, are of two ſorts, 1. When ſuch *Fees* exceed, or are contrary to an expreſs Act of Parliament. 2. When they are in themſelves, or in the *Manner*, againſt natural Senſe and Reaſon.

1. The firſt *Exception* againſt *Uſage*, and *Length of Time*, with regard to *Fees*, is, when they are contrary to an expreſs Act of Parliament. Though Uſage and Practice of Courts, eſpecially if of long continuance, not only in the Methods of Buſineſs, and Matters of Form, but in ſome other reſpects,

of more conſequence, may be good againſt an Act of Parliament; as will ſufficiently appear from the Reaſon and Authority cited in the above-named Diſcourſe, *fol.* 194, 195, *&c.* Yet in Matters of Right and Property, (which *legal Fees* of *Office* undoubtedly are) the Law I apprehend is clear, that no Preſcription, Cuſtom, or Uſage can be good, if they either exceed in *Quantity*, or in *Manner*, againſt an expreſs Act of Parliament: I ſay, againſt an expreſs Act; becauſe if an Act of Parliament concerning Right and Property, is capable of a double Conſtruction, the one agreeing with, and the other differing from the conſtant Uſage, there the Rule holds good, *Optimus Legum Interpres eſt Conſuetudo.* 2 Inſt. 18. 282.

2. The other Exception againſt Uſage, as to *Fees*, is, when they are ſuch as are in themſelves, or in the *Manner* unjuſt or repugnant to the natural Senſe, and Reaſon of Mankind. Theſe, as being *irrational*, are abſolutely unlawful, and ſuch as no Uſage, or Length of Time whatever, can make good.

Preſcription, Cuſtom, Uſage, or Length of Time, are good Arguments in Law, in ſupport of *legal Fees*, and in Reaſon; becauſe (as before obſerved) they are the beſt, and in moſt *Offices*, the only Evidence poſſible to be had of their being both *lawful* and *reaſonable*. But they can never alter the Nature of Things, and are the worſt of all

Arguments

Arguments in ſupport of *Fees* in themſelves, or in the Manner *irrational.*

By *irrational Fees*, I mean ſuch, and ſuch only, as any Number of indifferent Men, whether of ſuperior or common Senſe, and Underſtanding, muſt univerſally agree to be contrary to natural Reaſon.

To inſtance in a few that may have been, or may poſſibly hereafter be required.

1. For Buſineſs not performed in an *Office.*

2. For Buſineſs impoſed or forced on *Suitors*, which they neither want, nor require.

3. Where the Buſineſs when performed, is by the *Manner* thereof of no ſort of Service or Benefit to the *Suitors.*

If *Fees* are to be conſidered as *Munus Officii*, or under the Notion of a Recompence, how abſurd muſt be the Notion, when applied to ſuch Matters as theſe, which are of ſuch a Nature, that (I apprehend) every diſintereſted Man in the World, of what Education or Circumſtances ſoever, learned or unlearned, of common Senſe, and common Honeſty, muſt agree to be *irrational*; and if ſo, will (notwithſtanding any Cuſtom or Uſage, of what Length of Time ſoever) appear to have no Foundation in Law, for that they have none in Reaſon, if the Books I ſhall next quote are Law and Authority.

My Lord *Coke* (who is frequently ſtiled the great Oracle of the Law) in his Commentary on *Littleton*, *Sect.* 209. *fol.* 140. *a.* lays it down as a Maxim of the common Law, *That all Cuſtoms and Preſcriptions that be againſt Reaſon are void.* 3d Salk. 112. Tit. Cuſtom, Sect. 5. *Every Cuſtom ought to have a reaſonable Commencement, for no Uſage can make that good, which was not ſo* ab initio, Sect. 7. *A Cuſtom is not unreaſonable for being injurious to private Perſons or Intereſts, ſo as it tends to the publick and general Advantage,* Sect. 8. *Where a Cuſtom is injurious to the Publick, and only for the Benefit of ſome Individual, 'tis unreaſonable; for the Original of ſuch Cuſtom was by Tort or Uſurpation.*

The Caſe of *Taniſtry*, *Davis*'s Rep. fol. 32. *The Commencement of Cuſtom muſt be on a reaſonable Ground and Cauſe; for if it was unreaſonable in the Original, no Uſage or Continuance can make it good.* Quod ab initio non valuit, tractu temporis non convaleſcet. *A Cuſtom may be good which is contrary to a particular Rule of the Common Law: but a Cuſtom contrary to the publick Good, which is the Scope and general End of all Laws, or injurious to a Multitude, and beneficial to a particular Perſon, is repugnant to the Law of Reaſon, which is above all poſitive Laws, is void,* ab initio, *and no Preſcription of Time can make it good.*

In

In that ancient Treatiſe, intitled, *Doctor and Student*, of high Repute at this day, the Author, *Chap.* 2. *fol.* 4. ſpeaking of the Law of Reaſon, ſays, *It is never changeable by ne Divinity of Place, ne Time, and therefore againſt this Law, Preſcription, Statute, nor Cuſtom may not prevail; and if any be brought in againſt it, they be not Preſcription, Statutes, ne Cuſtoms, but Things void, and againſt Juſtice.*

Judge *Littleton* having, in *Sect.* 212. put a Caſe of a Preſcription, being void, as being againſt Reaſon, concludes thus; *And ſo ſuch Preſcription, or any other Preſcription, if it be againſt Reaſon, ought not to be allowed before Judges.* Quia malus uſus abolendus eſt. On which laſt Words, the Lord *Coke* comments thus, *Every Uſe is evil, that is againſt Reaſon.*

And in his ſame Commentary, on *Sect.* 80. *fol.* 62. *a.* he ſays, *It is an Incident inſeparable every Cuſtom muſt have*; viz. *that it be conſonant to Reaſon, how long ſoever it hath continued; if it be againſt Reaſon, it is of no force in Law.* But what he immediately after ſubjoins, is by no means to be omitted. *This is not to be underſtood of every unlearned Man's Reaſon, but of artificial and legal Reaſon, warranted by Authority of Law.*

On this laſt Comment of that profound Lawyer, I preſume, with great deference, to make ſome Obſervations in the Application,

to

to the Subject before me: That this Remark is certainly right in all Cases, which depend on the Law and *legal* Arguments; but when applied to Matters which depend partly on the Law, but principally on Matters of Fact, the most learned Man, *the Man best acquainted with artificial and legal Reason, warranted by Authority of Law*, cannot be supposed to reason justly without some Knowledge, and Information as well of the Fact, as of Law and Usage in these Cases.

In Trials at Law, there are two general Maxims:

Ad Quæstionem Legis non respondent Juratores.
Ad Quæstionem Facti non respondent Judices.

It would be no Diminution to my Lord *Coke*, if he were living; and it is no Diminution to the Learning of the ablest Council in all the Laws of Prescription, Custom, or Usage, to suppose him unacquainted with the particular *Fees* of *Office*; as it is no proof of a Man's being learned, that he knows the *Fees* of a particular, or a Number of *Offices*, better than all the World besides.

But of Matters in themselves absolutely unlawful and *irrational*, every honest and disinterested Man, indued with Reason, tho' unlearned, is an equal Judge with the Learned. If the Instances before-mentioned of *Fees* supposed *irrational*, are not such *Fees*, as every

such

ſuch Man muſt agree to be ſo; they are not ſuch unlawful *Fees* as come within the latter Exception againſt Uſage or Length of Time, or which are cognizable by any Perſons in their private Capacities, tho' they may be ſo by Juriſdiction and Authority.

THE

THE CONCLUSION.

THE Subſtance of the foregoing Diſcourſe may, I apprehend, be reduced to theſe Heads:

1*ſt*, That *Suitors* have at all times an *antecedent* and *legal* Right to the Duty of *Officers*, and to the Performance of all Acts of *Office*, neceſſary for the Proſecution or Defence of their Cauſes or Suits.

2*dly*, That the Performance of all Acts of *Office* depends on the Right or Pleaſure of the *Suitor*, in requeſting or directing that Performance.

3*dly*, That *Suitors* have at all times a *natural* Right to prevent the Performance of ſuch Acts of *Office*, whereon *Fees* ariſe, either by *not requeſting*, or by *rendring* (if they lawfully can) the Performance of ſuch Acts *unneceſſary*; or in other words, *Suitors* who are under no Impediment, may forgive and releaſe; *or* (whether under any Impediment or not) may forbear ſuing each other, if they *pleaſe*.

4*thly*,

4*thly*, That *Officers*, *upon* performing the Duty of their *Offices*, have at all times a *natural* Right to a ſuitable Recompence or Reward for ſuch Duty from the *Suitors*.

5*thly*, The *Quantum*, and *Manner* of the Recompence or Reward of *Officers*, being by Law limited to *Fees*, which are *legal* or *reaſonable*; *Officers* have therefore a *legal* Right to ſuch *Fees* as are *legal*, and an *equitable* Right to ſuch *Fees* as are *reaſonable*, tho' not ſtrictly *legal*.

6*thly*, The *Quantum*, and *Manner* of *Fees* of *Office*, may be *different* in different Times, and Circumſtances, and as the Methods of Buſineſs vary and alter.

7*thly*, That *Suitors* and *Officers* as ſuch, have (in common with every other Subject) an Inheritance in their mutual Rights, and in the Laws of the Land.

8*thly*, That the known, and allowed *Uſage* and *Practice* of *Courts of Juſtice*, is the Law of thoſe *Courts*, and a part of the *Law of the Land*.

9*thly*, That *Fees* by *Uſage* and *Length of Time*, are *legal Fees*; if not contrary to an Act of Parliament, or againſt natural Senſe and Reaſon.

10*thly*, That whatever is in itſelf, or in the Manner *abſolutely unlawful*, notwithſtanding any *Uſage*, of how long continuance ſoever, is of no force in Law.

I will put an end to the Reader's trouble, with ſome Remarks on the foregoing Diſcourſe.

1*ſt*, A due Knowledge of the *fundamental Rights* of *Suitors* and *Officers*, and a ſteddy adhering to the *Laws*, where they are plain and certain as to their reſpective Rights, is of the utmoſt Importance. Theſe are the beſt and ſureſt Preſervatives againſt any Injuries, or Hardſhips of either ſide. The Advice of *Queen Elizabeth* to the Univerſity of *Oxford*, is not, I apprehend, foreign or impertinent in the preſent Caſe; which was, "Not to go "before the Laws, but follow them; not to "diſpute whether better might be preſcribed, "but keep thoſe preſcribed already."

Indeed where the Law, eſpecially as to the *Quantum* of *particular Fees*, is dubious; equitable and reaſonable Allowances ought to be made by *Suitors*, not only for Errors and Miſapprehenſions, and for Uſage in any time paſt, tho' not ſtrictly *legal*, if not abſolutely unlawful; but likewiſe for the Alteration of Times, and in the Methods of Buſineſs: or elſe *ſummum Jus* may be *ſumma Injuria*. If the *firſt Principles* of Law and Right, which are founded in Reaſon, are always fairly and honeſtly kept in view, Equity, and Benevolence, with a ſuitable Experience and Application, will remove numberleſs Difficulties in forming right Notions concerning what is reaſonable, and in directing what may

or

or may not be complied with in Matters leſs fundamental, or dubious.

2*dly*, From what has been ſuggeſted, the Difference manifeſtly appears between interpreting and explaining *difficult* Caſes by ſuch as are *plain*; and perplexing *plain* Caſes by ſuch as are doubtful and *difficult*.

3*dly*, That *Officers* in Courts of Juſtice ought to be treated with Reſpect and Eſteem; and that a juſt Regard ſhould be had to their Rights and *Fees*. Such a Behaviour and Regard is of the utmoſt Conſequence and Benefit to *Suitors*; and whoever would diminiſh the *legal*, or *equitable Fees* of *Officers*, or in general treat them otherwiſe than in Terms of Eſteem, (whatever he may know or think of particular Perſons) is, to ſay no more, quite unacquainted with this Subject, and is no good Advocate for *Suitors*.

4*thly*, On the foregoing Principles it will follow, that no *Officer* ſhould order his Buſineſs in ſuch a manner, as by any Act of his own, or by any Act which it is in his power to prevent, to put the *Suitors* to the neceſſity of reſorting to other *Offices*, or to make their Suits, in his own, or other *Offices*, more expenſive than is neceſſary. Either of theſe Caſes, if the foregoing Principles are true, would be exerciſing a Right which belongs ſolely to the *Suitors*. I do not mean hereby to inſinuate, that *Officers* may not commendably wiſh well to their own and other

Offices; he would not deſerve the Name of an *Officer*, that did not: But he would not be a good Lawyer, Phyſician, or Truſtee, that did not conſult the true Welfare of his Client, Patient, or *Ceſtuy que Truſt*, more than his own particular Profit. Nor do I mean hereby to ſet Limits to the Diſcretion of *Officers*, or to preſcribe what is, or is not neceſſary in Matters depending on their Judgment and Diſcretion: All I mean is, that where there are two Methods of performing the ſame Buſineſs, either of which the *Officer* admits to be regular; but one of theſe Methods is more for the Benefit of the *Suitors*, and the other more for the Benefit of the *Officer* himſelf, or of other *Officers*; the *Suitor*'s Benefit is to be preferr'd, unleſs they freely conſent to the contrary.

5*thly*, *Suitors* ſhould ſubmit to ſuch *Fees* as are ſettled, and allowed by the Law, and Courts of Juſtice, as *legal* and reaſonable; ſeeing they have all the Evidence the Nature of things will admit, of their being lawful and reaſonable.

It would be well if *Suitors* (or thoſe concerned for them) knew, and would conſider the *Difference* of *antient* and *modern* Times; and that *Fees* of *Office* ſhould not only have a reſpect to the preſent and future Subſiſtance of *Officers*, and their Dependants, adequate to their Truſt and Labour, Rank and

and Station; but a juſt Regard ſhould be likewiſe had to the Time of Youth, and the Expence of Education at the Univerſities, and Inns of Courts, and to the requiſite Studies and Clerkſhips of ſuch as are *duly qualified* to be *Officers* in Courts of Juſtice.

F I N I S.

ERRATA.

P. 5. l. 11. *for* will immediately perceive, *r.* ſhould ſuppoſe.
l. 14. *after* a *add* great.
7. l. 29. *dele* ſelf.
12. l. 18. *r.* Maxims or Principles.
25. l. 15, and 22. *dele* the Comma after *Office.*
32. l. 24. *for* at, *r.* viz.
33. l. 18. *dele* the; *for* on, *r.* on a.
34. l. 3. *r.* Authorities.
37. l. 5. for *Divinity,* r. *Diverſity.*
23. after *Reaſon,* add *for.*

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